85-296

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

WILLIE GEISLER,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT AND THE KANSAS COURT OF APPEALS

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QUESTIONS PRESENTED

1. Does the good faith exception to the exclusionary rule apply where a Magistrate has abandoned his constitutional function and absolutely no probable cause has been shown, and has "totality" resurrected the "rubber stamp"?

2. Whether the Trial Court's restriction of the Petitioner's cross examination of the State's witness, Investigator Howard Budreau of the Concordia, Kansas, Police Department, in relation to his bias and prejudice violates the Petitioner's right to confront the witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1
OPINION BELOW 2
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 4
REASONS FOR GRANTING THE WRIT—

1. Does the Good Faith Exception to the Exclusionary Rule Apply Where a Magistrate Has Abandoned His Constitutional Function and Absolutely No Probable Cause Has Been Shown, and Has "Totality" Resurrected the "Rubber Stamp"? 9
2. Whether the Trial Court's Restriction of the Petitioner's Cross Examination of the State's Witness, Investigator Howard Budreau of the Concordia, Kansas, Police Department, in Relation to His Bias and Prejudice Violates the Petitioner's Right to Confront the Witnesses Against Him As Guaranteed by the Sixth Amendment to the United States Constitution? 14

CONCLUSION 16
APPENDIX—

A. Order of the Kansas Supreme Court Denying Petitioner's Petition for Review A1
B. Opinion of the Kansas Court of Appeals A2
C. Search Warrant Affidavit A11

TABLE OF AUTHORITIES

Cases

Brookhart v. Janis, 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245 (1966) 15
Davis v. Alaska, 415 U.S. 315, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974) 15
Illinois v. Gates, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983) 12, 13
Nathanson v. United States, 290 U.S. 41, 78 L.Ed. 159, 54 S.Ct. 11 (1933) 13
Massachusetts v. Upton, ... U.S. ....., 80 L.Ed.2d 721, 104 S.Ct. 2085 (1984) 9
Smith v. Illinois, 390 U.S. 129, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968) 15
State v. Mitchell, 8 Kan.App.2d 416, 658 P.2d 1063 (1983) 13
State v. Morgan, 222 Kan. 149, 563 P.2d 1056 (1977) 13
State v. Rose, 8 Kan.App.2d 659, 665 P.2d 1111 (1983) 9
State v. Prince, 227 Kan. 137, 605 P.2d 563 (1980) 11
United States v. Kolodziej, 712 F.2d 975 (5th Cir. 1983) 12
United States v. Leon, ... U.S. ....., 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984) 10, 12

Constitutional Provisions

U.S. Const. Amend. IV 2
U.S. Const. Amend. VI 2, 15
U.S. Const. Amend. XIV 3, 15

Statute

Article 65, Sec. 4127b(a)(3), K.S.A. 1984 Supp. 65-4127b(a)(3) 3, 4

No.

In the Supreme Court of the United States

October Term, 1985

WILLIE GEISLER,
Petitioner,

VS.

STATE OF KANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT AND THE KANSAS COURT OF APPEALS

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The Petitioner, Willie Geisler, respectfully prays that a Writ of Certiorari issue to review the Judgment of the Kansas Supreme Court in denying the Petitioner's Petition for Review of the Judgment of the Court of Appeals of the State of Kansas, affirming the Petitioner's conviction. The Judgment of the Kansas Supreme Court was entered on July 2, 1985. The Judgment and Opinion of the Kansas Court of Appeals was entered on May 21, 1985.

OPINION BELOW

The Opinicn of the Court of Appeals of the State of Kansas is unpublished; however, is appended hereto as Appendix B. The Order of the Kansas Supreme Court, denying review, without Opinion, is appended hereto, as Appendix A.

JURISDICTION

The Judgment of the Kansas Court of Appeals was entered on May 31, 1985. A timely Petition for Review by the Kansas Supreme Court was denied on July 2, 1985. This Petition for Certiorari is filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution (U.S. Const. Amend. IV) provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the United States Constitution (U.S. Const. Amend. VI) provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution (U.S. Const. Amend. XIV) provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 65, Sec. 4127b(a)(3) of the Kansas Statutes Annotated, 1984 Supp. (K.S.A. 1984 Supp. 65-4127b(a)(3)), states:

> (a) Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to manufacture, possess, have under such person's control, prescribe, administer, deliver, distribute, dispense or compound:
>
> "(3) any hallucinogenic drug designated in subsection (d) of K.S.A. 65-4105, and any amendments thereto."

STATEMENT OF THE CASE

The Petitioner was convicted of possession of a hallucinogenic drug, marijuana, in violation of K.S.A. 65-4127b (a)(3). Possession of marijuana, due to the Petitioner's previous conviction for the same offense, is a Class D felony, punishable by an indeterminate term of imprisonment, a minimum of not less than one year, nor more than three years, and a maximum of not less than five years, nor more than ten years, and/or a fine in a sum not exceeding $10,000.00. At the Petitioner's trial, the following facts were developed.

On April 11, 1983, at 2:01 p.m., Investigator Budreau of the Concordia Police Department applied to the Honorable Marvin Stortz, District Magistrate Judge of the Cloud County, Kansas, District Court, for a warrant authorizing the search of Willie Geisler's home and the seizure of marijuana. (R. Vol. I, p. 94). A copy of the affidavit for search warrant is appended to this Petition as Sec. C of the Appendix.)

First, the affidavit indicated that a confidential informant known to be reliable due to his past history gave information to Undersheriff Ruppert on April 11, 1983. The informant told Ruppert that over the preceding weekend, April 9 and 10, 1983, he had talked to an unknown individual who told the informant that he (the unknown individual) had just purchased one-half ounce of marijuana from the Geisler residence. The informant did not claim to have witnessed the transaction and did not state from whom the marijuana was purchased, nor did the informant give any indication that any marijuana remained at the residence. (R. Vol. I, p. 94)

Second, Investigator Budreau stated that recently one Robert Brown had stated that he had been at the Geisler trailer house on or about April 2, 1983, and had observed LSD, marijuana and cocaine at that location. Investigator Budreau does not state when this information was received from Brown, and was provided to a second officer, again absent any indication of reliability or credibility or police corroborative efforts. There is also no indication in the affidavit as to the circumstances under which Brown made these observations. It is not stated whether these items were seen stored at the residence or in the possession of someone else at the residence. (R. Vol. I, p. 94)

Finally, Budreau stated that a search warrant had been granted for the Petitioner's residence on August 11, 1983. The 1983 date is obviously a typographical error. However, there is no indication anywhere in the record that this error was corrected, noticed or even inquired about upon the presentation of the affidavit to the issuing Magistrate. Budreau indicates that the results of the execution of this search warrant resulted in the Petitioner's conviction of possession of marijuana. (R. Vol. I, p. 94)

The warrant was issued, as requested, by Judge Stortz at 2:01 p.m. on April 11, 1983. (R. Vol. I, p. 94) Investigator Budreau and several other officers of the Concordia, Kansas, Police Department and the Cloud County, Kansas, Sheriff's Department executed the warrant at approximately 2:41 p.m. that same day. (R. Vol. II, pp. 4, 6, 24) During the search, the officers discovered in an endtable located in the Petitioner's living room, a Gerber baby food jar containing a small amount of seeds and vegetation, a plate containing a small amount of seeds and vegetation, what was described as a "ramrod", a "bong", and a black .35 mm. film container. (R. Vol. II, p. 8) The contents of

the Gerber jar were identified as marijuana and seeds, and were admitted into evidence as State's Exhibit No. 2. (R. Vol. II, pp. 9, 55, 66) The contents of the plate were identified as marijuana and seeds and were admitted into evidence as State's Exhibit 10. (R. Vol. I, pp. 21, 55, 66) The pipestem and bowl from the "bong" were submitted for testing and the pipebowl was found to contain marijuana resin and THC. These items were admitted as State's Exhibit 6. (R. Vol. II, pp. 17, 56, 66)

The .35 film container was not placed into evidence nor were several other items that had been seized during the course of the search. (R. Vol. I, p. 94) The baby food jar, the plate, the "bong" and the bowl and stem of the "bong" were introduced into evidence as State's Exhibits Nos. 3, 9, 5, and 6 respectively. (R. Vol. II, pp. 10, 16, 20, 40, 66)

Investigator Budreau testified that he dusted the plate, the ceramic portion of the "bong" and the Gerber baby food jar for fingerprints. Investigator Budreau testified that he discovered several latent fingerprints present on the Gerber baby food jar and secured them as evidence. (R. Vol. II, pp. 12, 13) He testified that one print lifted from the baby food jar, State's Exhibit No. 4, was forwarded to the Kansas Bureau of Investigation laboratory for comparison with the Petitioner's fingerprints. (R. Vol. II, pp. 14-16) Investigator Budreau testified that he forwarded two index cards containing a total of four fingerprints lifted from the ceramic portion of the "bong", State's Exhibit No. 7, containing one fingerprint, and State's Exhibit No. 8, containing three fingerprints. (R. Vol. II, pp. 19, 20) On direct examination, Investigator Budreau mentioned that there were several latent prints lifted from the jar. (R. Vol. II, p. 13) On cross examination, Investigator

Budreau testified that there were four fingerprints lifted from the Gerber jar that were submitted to the Kansas Bureau of Investigation lab for comparison. (R. Vol. II, pp. 30, 31) Investigator Budreau also testified on cross examination that he lifted more than ten latent fingerprints from State's Exhibit No. 9, the plate, and that none of these latents was submitted to the Kansas Bureau of Investigation laboratory for comparison. (R. Vol. II, pp. 29, 30) Investigator Budreau stated that the only prints which he submitted to the K.B.I. for comparison were those which he believed to be prints of the Petitioner. (R. Vol. II, pp. 32, 33) A total of only five prints were sent for comparison. Also sent for comparison was State's Exhibit No. 11, a "major case" print of the Petitioner, consisting of the inked impression of the Petitioner's left hand. (R. Vol. II, pp. 46, 48, 51)

Carl J. Carlson, a criminalist, specializing in the examination and comparison of latent fingerprints for the K.B.I., testified on behalf of the State. (R. Vol. II, p. 71) Mr. Carlson testified that the palmprint on State's Exhibit No. 4, the single fingerprint contained on State's Exhibit No. 7, and one of the three prints on State's Exhibit No. 8, were caused by the same individual whose inked impression appeared on State's Exhibit No. 11. (R. Vol. II, pp. 72-74) Mr. Carlson also stated that the additional two fingerprints contained on State's Exhibit A were insufficient for comparison. All latent prints submitted to Carl J. Carlson for examination were requested solely for comparison to that of the suspect, Geisler. (R. Vol. II, pp. 90-91)

The balance of the State's witnesses were either repetitive or concerned only with matters concerning the chain of custody of the State's Exhibits. As no issue is

raised concerning chain of custody, the testimony of the State's additional witnesses is not summarized.

During the course of cross examination, the Petitioner's counsel attempted to cross examine Investigator Budreau concerning his bias or prejudice toward the Petitioner. This cross examination was cut off when the Court sustained an objection by the counsel for the State. (R. Vol. II, pp. 39, 40)

The Petitioner presented the testimony of four witnesses, including the Petitioner. The testimony of the witnesses totally supported, going unrebutted, the Petitioner's notice of alibi. (R. Vol. I, p. 64) The Petitioner's notice of alibi reflected during this period, the spring of 1983, the Petitioner spent at best three nights at Concordia, Kansas.

The jury found the Petitioner guilty. (R. Vol. I, p. 72) The Court sentenced the Petitioner to the custody of the Secretary of Corrections for a minimum term of one (1) year, and a maximum term of five (5) years, together with a fine of $500.00. The Court placed the Petitioner on probation for a term of three (3) years under the standard conditions of probation and the special condition that the Petitioner serve six (6) months in the Cloud County, Kansas, jail. (R. Vol. II, pp. 154, 155)

REASONS FOR GRANTING THE WRIT

1. Does the Good Faith Exception to the Exclusionary Rule Apply Where a Magistrate Has Abandoned His Constitutional Function and Absolutely No Probable Clause Has Been Shown, and Has "Totality" Resurrected the "Rubber Stamp"?

In all deference and with the greatest respect, we unfortunately note in the Kansas Court of Appeals' Opinion herein ongoing efforts to deny any Fourth Amendment complaints registered and defer further efforts to a Higher Court on facts that clearly fail to justify a finding of remote cause, let alone probable cause. However, the Court of Appeals in affirming the Petitioner's conviction has now exceeded the bounds of the "rubber stamp" and has resurrected Pothier's Theory of Subjective Manifestation, the foundation of the Napoleonic Code.

The Kansas Court of Appeals' Opinion (Appendix B, pg. 4), found that the Petitioner urged the Court to hold that double hearsay tips cannot be used to corroborate each other, standing alone. The Petitioner respectfully urged the Court to hold, without more, that two possible quadruple hearsay "tips" cannot be used to corroborate each other. The Court suggests that our position was at odds with *Massachusetts v. Upton,* ..... U.S. ....., 80 L.Ed. 2d 721, 727, 104 S.Ct. 2085 (1984), and *State v. Rose,* 8 Kan. App.2d 659, 662-663, 665 P.2d 1111 (1983). The Court further found "We are cognizant of the affidavit's shortcomings in demonstrating trustworthiness of the statements of one Brown." Again, in all deference to the Court, we note in *Massachusetts v. Upton,* 80 L.Ed.2d at 727, 728, we had an identified informant, along with police corroborative efforts; in *State v. Rose,* at 663, we had an

informant who not only made personal observations, he made declarations against penal interest and described previous criminal conduct that was verified. The attached affidavit in the Petitioner's case goes clearly without veracity, reliability or basis of knowledge, in that we have two tips; the first being quadruple hearsay, the informant's informant; the second, which the Court discounts, being possibly quadruple hearsay or worse, that allowed the Court of Appeals to conclude a substantial basis existed for a finding of probable cause. The last revelation is the Defendant's conviction of possession of marijuana some four months after the affidavit's execution and the warrant's issuance herein that went without judicial interference, correction or inquiry. The attached affidavit of Investigator Budreau of April 11, 1983, which was the only evidence presented to the Court to obtain a search warrant on the same date for the Petitioner's residence, allowed the Court of Appeals (Appendix B, pg. 4), of the Court's Opinion, to find that the issuing Magistrate "had a substantial basis for a finding that probable cause existed and even if we were to find that the search warrant issued without probable cause, we note this case falls within the rule that evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant is not to be excluded." *United States v. Leon*, ... U.S. ....., 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984). The Court's Opinion does not bless us with the Court's finding supportive of the Court's holding that a substantial basis existed herein, or the "good faith exception" was to apply. Hence, we are forced to suggest the only possible findings that the attached affidavit could reflect:

1. The affiant had a reliable informant who provided information to Undersheriff Ruppert that an unknown subject provided the reliable informant in-

formation that the unknown subject had purchased a half ounce of marijuana from the Geisler residence the previous week-end. The baggie in which the marijuana was obtained had Disney characters on it. The Geisler residence went without identification or location.

2. The affiant reflects that information was recently received from one Robert Brown that he was at the Geisler trailer house in the 500 block of East Second Street, Concordia, Kansas, on or about April 2, 1983. While there, Brown observed LSD, marijuana and some cocaine. The affiant thereafter reflects that Officer Lowell of the Concordia Police Department seized a baggie of marijuana from Brown showing that said subject does have connection with controlled substances, to-wit: marijuana. The affiant does not reflect that the marijuana baggie seized from Brown had Disney characters on it, and additionally failed to provide any information other than recently as to when the information was received, from whom the information was received or how the affiant obtained same.

3. Geisler was convicted of possession of marijuana on August 11, 1983.

There is not one scintilla of police corroborative effort. The affidavit goes without underlying circumstances, description or recitation of knowledge. In addition, the informant's informant's information clearly cannot be elevated to a declaration against penal interest, as the informant was unaware that his information was being provided to authorities. *State v. Prince*, 227 Kan. 137, 605 P.2d 563 (1980). The Court of Appeals again rejects Brown's tip; however, what attestation is found of reliabil-

ity to one, or for that matter, both, that the Petitioner had contraband in his home or remotely suggests any police corroborative efforts in support thereof? *United States v. Kolodziej*, 712 F.2d 975 (5th Cir. 1983). The affiant concluded in Paragraph 2 of the attached affidavit solely that marijuana was to be found at the Geisler residence, rejecting Brown's revelation as to what he saw, marijuana, cocaine and LSD. The affidavit not only requires the abandonment of judicial discretion to allow for the issuance of the search warrant, it is less than "bare bones", as the investigative effort afforded these tips are nil, which precludes in itself any good faith reliance on the warrant's issuance herein by the officers. *United States v. Leon*, ... U.S. ....., 82 L.Ed.2d 677, 701, 104 S.Ct. 3405 (1984).

The fullest concept of probable cause, equating totality, "veracity, reliability and basis of knowledge, a deficiency in one may be compensated for in another, in determining the overall reliability of a tip by a strong showing as to the other, or by some indicia of reliability", detailed description, personal observation. We have in the attached affidavit no attestation of veracity or reliability, no detailed description and personal observation from one Brown, without any revelation as to whom Brown provided this information. *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 545, 103 S.Ct. 2317 (1983). Brown's information was not only rejected by the Court of Appeals, it was rejected by the affiant in his affidavit of April 11, 1983, as he seeks out authority to search for marijuana, not LSD or cocaine.

How is it possible to infer that the informant's informant was at the Geisler residence without identification of the residence, its whereabouts or other relevant information supportive of this conclusion; who was at the residence; who was the purchase made from at the Geisler

residence? What verbiage is found to support the affiant's conclusion that marijuana is located at the Petitioner's residence, as found in Paragraph 2 of the affidavit, without so much following as an inference in support thereof? The exact verbiage was rejected by this Court in *Nathanson v. United States*, 290 U.S. 41, 78 L.Ed. 159, 54 S.Ct. 11 (1933), same being approved again by this Court in *Gates*, 76 L.Ed.2d at 549. In considering the " 'veracity' and 'basis of knowledge', of a person supplying information that there is a fair probability that contraband or evidence of a crime will be found" in the Petitioner's residence. *Gates*, 76 L.Ed.2d at 548. What verbiage is found either from the informant's informant or Brown that the Petitioner was present at the time of the alleged purchase or the alleged observation? Why do both the informant's informant and Brown in their revelations refer solely to the Geisler residence and how are they knowledgeable that the residence is that of the Petitioner, or that contraband is present? And how was Brown's information forthcoming to the affiant, osmosis? *State v. Mitchell*, 8 Kan.App.2d 416, 658 P.2d 1063 (1983); *State v. Morgan*, 222 Kan. 149, 153, 563 P.2d 1056 (1977); *Gates*, 76 L.Ed.2d at 549. "Substantial basis" requires "sufficient information", the Magistrate's action "cannot be a mere ratification of bare bones conclusions of others". *Gates*, 76 L.Ed.2d at 693. To escape suppression and exclusion, firstly, the judicial role must not be abandoned and then to utilize the "good faith exception", the authorities must have relied on the warrant's issuance with objective reasonableness. To possess objectively reasonable grounds in relying on the warrant, something must appear, save conclusion, "intensive investigation". Here, we have none. *Leon*, at 82 L.Ed.2d 701. The executing officer and the affiant are one and the same. *Leon*, at 82 L.Ed.2d 699.

2. Whether the Trial Court's Restriction of the Petitioner's Cross Examination of the State's Witness, Investigator Howard Budreau of the Concordia, Kansas, Police Department, in Relation to His Bias and Prejudice Violates the Petitioner's Right to Confront the Witnesses Against Him As Guaranteed by the Sixth Amendment to the United States Constitution?

The Court, Appendix B, pgs. 6, 7, made the requisite findings that brought about the Petitioner's need to fully cross examine Investigator Budreau in relation to fingerprint evidence. "What the evidence shows was that Budreau lifted several prints from the items seized, but did not send all prints lifted to the K.B.I. for comparison. He sent only those prints he believed to be Geisler's. Likewise, the forensic examiner at the K.B.I. did not evaluate all the prints Budreau submitted to him; he testified several were not sufficient for comparison." The Petitioner's cross examination thereafter established, as found at Page 6 of the Court's Opinion, that Budreau had known Geisler for a good number of years; however, in addition, the forensic examiner testified that all latent prints submitted to him for examination were requested solely for comparison to that of the suspect, Geisler. (R. Vol. II, pp. 90-91) To my inquiry concerning the fact that the officer did not care too much for Geisler, the State's unspecified ground in objection was sustained, the Court's Opinion at Page 6, as the Court found the Petitioner knew or he anticipated his inquiry would lead into the supposed dislike of Budreau for Geisler. The Court of Appeals thereafter applied a divisible standard to the restrictions placed on the cross examination of Budreau. The Court noted that counsel's failure to make an offer of proof may foreclose

this issue on appeal; however, the Court additionally found "We are unpersuaded that the Trial Court's restrictions of cross examination was a clear abuse of discretion." From the state of the Court of Appeals' Opinion, the Court was able to discern what the Petitioner had and was attempting to establish, bias and prejudice. To foreclose this issue, which was known to all, as a possible State policy in the administration of criminal justice, can be used to foreclose the constitutional right under the confrontation clause. *Davis v. Alaska,* 415 U.S. 315, 319, 39 L.Ed.2d 347, 353, 355, 94 S.Ct. 1105 (1974). "To say that prejudice can be established only by showing that the cross examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and would withdraw one of these safeguards essential to a fair trial." *Smith v. Illinois,* 390 U.S. 129, 132, 19 L.Ed.2d 956, 959, 88 S.Ct. 748 (1968). The right to cross examine is guaranteed by both the Sixth and Fourteenth Amendments to the United States Constitution, and the denial of the right to cross examine the witnesses against him is a constitutional error which no amount of showing of want of prejudice can cure. *Brookhart v. Janis,* 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245 (1966).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment of the Kansas Supreme Court, along with the Judgment and Opinion of the Kansas Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 84-57120-A

IN THE

SUPREME COURT OF THE STATE OF KANSAS

State of Kansas, Appellee,

v.

Willie Geisler, Appellant.

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR REVIEW.

DENIED. Mandate is stayed until September 3, 1985.

Yours very truly,

Lewis C. Carter

Clerk, Supreme Court

Date July 2, 1985

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

No. 57,120

IN THE

COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

WILLIE GEISLER,
Appellant.

MEMORANDUM OPINION

Appeal from Cloud District Court; RICHARD W. WAHL, judge. Opinion filed May 31, 1985. Affirmed.

John C. Humpage, of Humpage, Berger and Hoffman, of Topeka, for appellant.

C. L. Laman, special assistant county attorney, and *Robert T. Stephan,* attorney general, for appellee.

Before ABBOTT, P.J., REES and PARKS, JJ.

Per Curiam: Defendant Willie Geisler appeals his conviction of second offense possession of a hallucinogenic drug, marijuana, in violation of K.S.A. 1984 Supp. 65-4127b (a)(3), a Class D felony. On appeal, Geisler charges error in the trial court's (1) failure to suppress certain evidence; (2) overruling of his motions for judgment of acquittal; (3) restriction of his cross-examination of a State witness; and (4) refusal to instruct the jury according to his requested instructions. We affirm.

Geisler first asserts that the trial judge erred in overruling his motions to suppress evidence seized in execution

of the search warrant, a warrant authorizing and directing search of his residence. The crux of his complaint is that the warrant was issued without probable cause; specifically, that the supporting affidavit was insufficient because it relied on hearsay tips of two informants. The parties are fully aware of the text of Budreau's affidavit provided in support of the search warrant applications. It need not be repeated. We are fully cognizant of the lack of identification of the declarant of the hearsay statement attributed by Budreau to the unnamed confidential informant and the lack of showing of that declarant's veracity and reliability. We also are fully cognizant of the affidavit's shortcoming in demonstrating trustworthiness of the reported statements by one Brown.

The magistrate found probable cause to issue the warrant. It was executed the same day. Officers discovered and seized from Geisler's residence a bong, a ramrod, and a baby food jar and plate containing seeds and vegetation, later identified as marijuana. The pipestem and bowl of the bong were tested and found to contain marijuana resin. Fingerprints were lifted from several of these items; some of the prints matched those of Geisler. Geisler was later arrested for possession of marijuana, and the evidence seized as a result of the search was introduced at trial against him.

In *State v. Rose*, 8 Kan.App.2d 659, 662-63, 665 P.2d 1111, *rev. denied* 234 Kan. 1077 (1983), we adopted the *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983), totality of the circumstances test to ascertain whether the evidence presented to obtain a search warrant presents probable cause to believe evidence is located in a particular place. Under *Gates*, the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth

in the affidavit before him, including the "veracity" and "basis of knowledge" of hearsay declarants, there is a fair probability that contraband or evidence of a crime will be found in a particular place. 462 U.S. at 238. This court's scope of review on appeal is thus whether the judge who issued the warrant had a substantial basis for concluding that probable cause existed. 8 Kan.App.2d at 663. In addition, a deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant. *Massachusetts v. Upton,* ..... U.S. ....., 80 L.Ed.2d 721, 727, 104 S.Ct. 2085 (1984).

Geisler urges us to hold that two "double hearsay tips," arguably insufficient standing alone, cannot be used to corroborate each other so as to support a magistrate's finding of probable cause for issuance of a search warrant. This suggested approach is at odds with the approach initiated by adoption of the totality of the circumstances test; it would have us judge "bits and pieces of information in isolation against the artificial standards provided by the two-pronged [*Aguilar-Spinelli*] test." *Massachusetts v. Upton,* 80 L.Ed.2d at 727. Rather, our task should be to "consider [the] affidavit in its entirety, giving significance to each relevant piece of information and balancing the relative weights of all the various indicia of reliability (and unreliability) attending the tip." 80 L.Ed.2d at 727.

Under this latter approach, we conclude the issuing magistrate below had a substantial basis for finding that probable cause existed. *State v. Rose,* 8 Kan.App.2d at 663-64. And even were we to find the search warrant was issued without probable cause, we note this case falls within the rule that evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant is not to be excluded. *United States v. Leon,* .....

U.S. ....., 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984). See also *United States v. Sager*, 743 F.2d 1261, 1264-65 (8th Cir. 1984), *cert. denied* ..... U.S. ....., 84 L.Ed.2d 341 (1985) (applying *Leon* retroactively). In either event, we hold there was no error as a matter of law in the denial of Geisler's motions to suppress evidence seized as a product of the search of his residence.

Second, Geisler contends the trial court erred in overruling his motions for judgment of acquittal. Specifically, he argues that the evidence showed he was not in exclusive possession of his residence and that the State should have presented additional evidence to show his possession of the marijuana. He also argues the fingerprint evidence was legally insufficient to prove his guilt.

The record reveals that Geisler was away from his residence for most of the month before the search and arrest, although he had spent two or three nights at his Concordia residence. During that time, three young men were employed by Geisler to do yardwork at his residence and they had his permission to enter the residence to use the bathroom or to get water. They testified they entered the residence frequently. None of the three ever saw the marijuana or paraphernalia the officers found in plain view. All denied involvement with drugs. All said that people stopped by Geisler's home occasionally, but they never asked these unknown visitors who they were or what they were doing. One said none of the visitors who entered Geisler's residence stayed for an extended period of time. None of these mysterious visitors were produced to testify at trial.

In *State v. Bullocks*, 2 Kan.App.2d 48, 50, 574 P.2d 243, *rev. denied* 225 Kan. 846 (1978), it is noted that when a defendant is in nonexclusive possession of premises on which drugs are found, the better view is that it cannot

be inferred that the defendant knowingly possessed the drugs unless there are other incriminating circumstances linking the defendant to the drugs. See also *State v. Goodwin,* 4 Kan.App.2d 81, 603 P.2d 194 (1979), *rev. denied* 227 Kan. 928 (1980). Incriminating factors are the defendant's previous participation in the sale of drugs, his use of narcotics, his proximity to the area where the drugs are found, and the fact that the drugs are found in plain view. Other factors often noted include incriminating statements of the defendant, suspicious behavior, and proximity of defendant's possessions to the drugs. *State v. Bullocks,* 2 Kan.App.2d at 50.

Although Geisler argues the only incriminating circumstance linking him to the marijuana is his fingerprints, we believe there are others: that he admitted owning the plate and "vase," as he called the bong; that he had been convicted of possession of drugs before; and that the evidence was found in plain view. *State v. Whitehead,* 226 Kan. 719, 722, 602 P.2d 1263 (1979); *State v. Bullocks,* 2 Kan.App.2d at 50. The open display of the marijuana and paraphernalia tends to show knowledge and absence of mistake bearing on defendant's intent to possess the marijuana found in his home. *Bullocks,* 2 Kan.App.2d at 50. The jury acted within its privilege in refusing to believe Geisler's inference that the unknown visitors were responsible for taking marijuana into Geisler's home. In short, although they might well have found otherwise, rational factfinders could have found Geisler guilty beyond a reasonable doubt on this evidence, even without the fingerprints. *State v. Pham,* 234 Kan. 649, 667-68, 675 P.2d 848 (1984); *State v. Bullocks,* 2 Kan.App.2d at 50.

As for the fingerprints, Geisler contends they are legally insufficient to prove his guilt. What the evidence showed was that Budreau lifted several prints from the items seized but did not send all prints lifted to the KBI

for comparison. He sent only those he believed to be Geisler's. Likewise, the forensic examiner at the KBI did not evaluate all the prints Budreau submitted to him; he testified several were not sufficient for comparison.

The implications of these selective identifications were for Geisler to argue to the jury: "The means or manner in which the extrajudicial identification is made relates to the weight and sufficiency of the evidence." *State v. Galloway,* 235 Kan. 70, 87, 680 P.2d 268 (1984). Although it may be true, as Geisler suggests, that fingerprint evidence *alone* is insufficient to convict barring special circumstances (see *United States v. Jones,* 433 F.2d 1107 [D.C. Cir. 1970] [burglary of a coin-operated machine; defendant's fingerprints found on money box that had been located inside a locked meter box]), here the State established several circumstances incriminating Geisler. We hold there was no error in the trial court's denial of Geisler's motions for acquittal.

Third, Geisler argues the trial court erroneously restricted his cross-examination of Budreau.

At the beginning of the cross-examination, Geisler's counsel asked Budreau whether he had known Geisler for a good number of years. Budeau replied he had. Then, at the end of the cross-examination, counsel asked:

> "Now let me ask you, officer—I'm not trying to be smart, I just want to ask you, wouldn't it be a fair statement the fact that you don't care too much for Mr. Geisler?"

The State's objection on unspecified grounds was sustained. Geisler's counsel then stated he had nothing further at that point.

On appeal, Geisler argues his cross-examination of Budreau was restricted in violation of his Sixth Amend-

ment right of confrontation. In response to the State's counter that Geisler failed to make an offer of proof, Geisler argues in his reply brief that the offer of proof requirement does not apply to cross-examination.

Evidence of bias, interest or improper motives of a witness may always be shown in order to place his testimony in proper perspective. *State v. Loveland,* 8 Kan. App.2d 196, 200, 653 P.2d 472 (1982), *rev. denied* 232 Kan. 876 (1983). the trial court is, however, granted broad discretion in controlling the scope of cross-examination and absent a showing of clear abuse of the exercise of that discretion there is no error. *State v. Martin,* 234 Kan. 115, 120, 670 P.2d 1331 (1983). Further, a verdict will not be set aside by reason of the erroneous exclusion of evidence unless there appears of record a proffer of the evidence sought to be introduced. K.S.A. 60-243 (c); 60-405.

Geisler relies on *State v. Montanez,* 215 Kan. 67, 523 P.2d 410 (1974), for the proposition that K.S.A. 60-405 and 60-243 (c) do not apply to cross-examination. His reliance is in error. *Montanez* is inapposite, as it involved whether a defendant's Sixth Amendment right to confront was paramount to a witness' Fifth Amendment right against self-incrimination such that the witness' testimony should be stricken. Geisler further argues that the proffer rule should not apply because counsel does not always know where an inquiry will lead. Here, however, Geisler admits he knew where he anticipated his inquiry would lead—into the supposed dislike of Budreau for Geisler. Geisler was not prevented from proffering to the judge what he in tended to show. In sum, we are unpersuaded that the trial court's restriction of cross-examination was a clear abuse of discretion.

Finally, Geisler argues it was error for the court to refuse to instruct the jury according to his requested Instructions Nos. 1, 3 and 9.

Geisler's requested Instruction No. 1 set forth the elements of the charge of possession of marijuana in accordance with PIK Crim.2d 67.13, with the addition of the legal definition of marijuana found at K.S.A. 65-4101 (o). That definition excludes from the term "marijuana" the mature stalks of the plant and sterilized seed incapable of germination. Geisler contends it was the State's burden to prove the vegetation seized from his residence did not *contain* mature stalks and seeds incapable of germination.

Geisler's contention is without merit. Under the provisions of K.S.A. 65-4101 *et seq.*, the possession of *any* quantity of a controlled substance is sufficient to sustain a conviction. Therefore, the quantity of a controlled substance is not a material element of the crime charged here. *E.g., State v. Loveland,* 8 Kan.App.2d at 199. Carl Anderson, KBI forensic examiner, testified that he found marijuana and its active ingredient in the baby food jar and on the plate, and that he found marijuana resin with the active ingredient in the stem and bowl of the bong. His testimony as to the nature of the substances he discovered was undisputed.

In charging the jury, the court has the duty to define the offense charged and each essential element of the crime. *State v. Miller,* 222 Kan. 405, 565 P.2d 228 (1977); *State v. Loveland,* 8 Kan.App.2d at 202. Since marijuana, as statutorily defined, was indisputably found to be present, and since the quantity of the amount found is not a material element of the crime of possession of marijuana, the trial court's refusal to give Geisler's requested instruction was entirely proper.

We have reviewed Geisler's requested instructions Nos. 3 and 9 and find that their substance was adequately covered by the instructions the court did give. *State v.*

Abu-Isba, 235 Kan. 851, 859, 685 P.2d 856 (1984). Instruction No. 3, giving Geisler's definition of "possession," was lengthy, confusing and repetitive. The trial court's instruction defining possession was specifically approved in *State v. Adams,* 223 Kan. 254, 256, 573 P.2d 604 (1977). We see no error.

Requested Instruction No. 9 reportedly outlines Geisler's "theory" of the case. We agree with the trial court it was argument. Although an accused is entitled to instructions on his theories of defense if they are supported by any evidence whatsoever, *State v. Heiskell,* 8 Kan.App. 2d 667, 673, 666 P.2d 207 (1983), Geisler's proposed instruction is not his "theory" as much as it is a summation of the evidence his witnesses presented. Instructions are an improper place for jury argument. See *Hollinger v. Stormont Hosp. & Training School for Nurses,* 2 Kan.App. 2d 302, 307-08, 578 P.2d 1121, *rev. denied* 225 Kan. 844 (1978).

Further, those cases in which a defendant's proposed instruction on "theory" is in issue involve situations not present here, such as the possibility the evidence establishes a lesser included offense (*e.g., State v. Farley,* 225 Kan. 127, 587 P.2d 337 [1978] [involuntary and voluntary manslaughter]) or the possibility the evidence establishes an affirmative defense [*e.g., State v. Heiskell,* 8 Kan.App. 2d 667 [self-defense]). And evidence merely tending to refute or deny an element of the crime charged does not necessarily constitute an affirmative defense entitled to a separate instruction. *State v. Davis,* 236 Kan. 538, 694 P.2d 418 (1985).

We find no error in the instructions given or in the refusal to give the instructions requested.

Affirmed.

APPENDIX C

(Filed April 11, 1983)

AFFIDAVIT AND APPLICATION FOR SEARCH WARRANT

No.....
Dkt....., Pg.....

STATE OF Kansas, COUNTY OF Cloud
Dated 04-11-83, 1983 at 2:01 P.M.

Investigator Howard S Budreau, Concordia Police Department being first duly sworn on oath, says that he has reason to believe as follows:

1. The following crime or crimes are being or have been committed.[1] Possession and or sale of a controlled substance to-wit marijuana

2. The following particularly described items are contraband, evidence, fruits, or instrumentalities of said crime or crimes: A controlled substance to-wit marijuana in violation of K.S.A. 65-4127ba3

3. The foregoing items are located at or on:[2] 518 E. 2nd Street, Concordia, Kansas, County of Cloud. A trailor house under the control of one Willie Geisler.

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1. Set forth various charges possible under the facts as presently known.

2. Describe specifically and with particularity, the person, place, or means of conveyance for which search is requested—must be within county where court is located if issued by court of limited jurisdiction.

4. This affidavit and application is based on the following facts:[3]

Your affiant deposes and states that a reliable informant, who has supplied information in the past which has led to the arrest and conviction of (2) two individuals for controlled substance violations, has provided information which has led to the apprehension of a fugitive felon, and further has supplied information recently which has led to the arrest of another individual for a controlled substance violation. That the confidential informant has no criminal record and is considered as being trustworthy by your affiant.

Your affiant further states that on 04-11-83 Undersheriff Rupert received information from the reliable informant who devulged the following. That during this past weekend the reliable informant had opportunity to speak with a subject who had just purchased a half ounce from the Geisler residence. That the amount paid was $20.00 and further stated that said marijuana was actually seen by the confidential informant. The informant concluded by stating that the marijuana was in a sandwich baggy which had Disney Characters on said bag.

Your affiant further states that information was recently received from one Robert BROWN, DOB 6-16-60 SSN 805-25-558 that he was at the Geisler trailor house in the 500 Blk of E. 2nd Street, Concordia Kansas on or about 4-2-83. That while at said location BROWN ob-

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3. Set forth facts and circumstances specifically, with particularity, in considerable detail and when and how information acquired—by observation, surveillance, informant, etc., and if by informant, describe how reliability verified—previous proven reliability, corroboration by other physical observations, etc. If necessary, attach additional pages and identify as exhibit. Reduce to writing any other relevant bolstering evidence brought out by judge's oral inquiry into supporting facts under oath.

served LSD, Marijuana, and some Cocaine. Your affiant further states that a baggy of marijuana was seized by officer Lowell of the Concordia Police Department and linked with BROWN showing that said subject does have connections with controlled substances to-wit marijuana.

Your affiant concludes stating that on 8-11-83 a search warrant was granted for 518 E 2nd Street, Concordia, Kansas being the Giesler residence so stated above. That as a result of this search warrant and the investigation around same Willie Giesler was convicted for possession of marijuana.

Further your affiant saith not.

WHEREFORE, the undersigned requests that a search warrant issue for the items described herein, as provided by law.

/s/ Howard S. Budreau
Affiant—Applicant

Subscribed and sworn to before me on the above shown date and time.

/s/ Marvin L. Stortz
Judge—Magistrate